

Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT:

STEVEN C. EARNHART
Indianapolis, Indiana

ATTORNEY FOR APPELLEES:

MARK R. WATERFILL
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

BRYAN MITCHELL,)	
)	
Appellant-Plaintiff,)	
)	
vs.)	No. 29A02-0605-CV-386
)	
CASSANDRA L. WELCH, and)	
BRIAN C. WELCH,)	
)	
Appellees-Defendants.)	

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable Daniel J. Pfleging, Judge
Cause No. 29D02-0406-CC-00513

FEBRUARY 16, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Plaintiff-Appellant Bryan Mitchell (“Mitchell”) appeals the trial court’s orders in favor of Defendants-Appellees Cassandra L. Welch (“Cassandra”) and Brian C. Welch (“Brian”) (collectively, “the Welches”). We affirm.

ISSUES

Mitchell raises six issues for our review, which we consolidate and restate as:

- I. Whether the trial court erred in not ruling on Mitchell’s motion to strike and in denying Mitchell’s motion for summary judgment.
- II. Whether the trial court erred in ruling against Mitchell on his breach of contract and fraud claims.
- III. Whether the trial court erred in determining Mitchell’s claims were barred by the statute of frauds.

FACTS AND PROCEDURAL HISTORY

Mitchell and Cassandra were co-workers at Eli Lilly & Company and co-owners of a corporation that would buy properties, rent them, renovate them, and then sell them. In 2004, Mitchell filed a complaint alleging that in 2002 he entered into a contract with Cassandra and her husband, Brian, whereby he agreed to loan them \$10,000. The complaint alleged that the loan was made in two installments, the first was in the amount of \$2,500 (paid to the Welches on October 11, 2002) and the second was in the amount of \$7,500 (paid to the Welches on October 23, 2002). The complaint also alleged that the Welches agreed to make payments of \$200 per month, with the balance due upon the sale of their home. The complaint further alleged that Mitchell believed that the loan was

secured by a mortgage on the Welches' home and that he would not have made the loan without that belief.

The complaint alleged both breach of contract and fraud. The breach of contract claim was based upon the Welches' failure to abide by the terms of the alleged loan contract. The fraud claim was based upon the Welches' alleged misrepresentation to Mitchell that the loan would be secured by a mortgage on their house.

In their answer, the Welches denied that the loan was made. Mitchell then filed a motion for summary judgment with supporting affidavits and exhibits, and the Welches filed a response with Cassandra's supporting affidavit and exhibits. Mitchell responded by filing a motion to strike Cassandra's affidavit and exhibits. The trial court did not rule on the motion to strike; however, it did deny the summary judgment motion.

A bench trial was held at which the Welches did not attend and in which Mitchell, as the sole witness, was cross-examined by the Welches' attorney. The trial court subsequently entered an order stating that Mitchell had failed to prove either that a contract existed or that he was defrauded. The trial court further found that Mitchell's claim was governed by the statute of frauds.

Additional facts will be disclosed below as necessary.

DISCUSSION AND DECISION

I. MOTION TO STRIKE/SUMMARY JUDGMENT

Mitchell contends that the trial court erred in not striking Cassandra's affidavit and exhibits and in not granting his motion for summary judgment. Mitchell argues that the affidavit and exhibits should have been stricken because they were not made on personal

knowledge, did not set forth facts as would be admissible in evidence, and did not establish that Cassandra was competent to testify to the matters stated therein. Mitchell argues that the exhibits should have been stricken because they were not authenticated. Finally, Mitchell argues that his motion for summary judgment and designated evidence are sufficient to show that there is no issue of material fact pertaining to his claims of breach of contract and fraud and that he is entitled to judgment as a matter of law.¹

The purpose of summary judgment is to terminate litigation about which there is no factual dispute and which may be determined as a matter of law. *Ratcliff v. Barnes*, 750 N.E.2d 433, 436 (Ind. Ct. App. 2001), *trans. denied*. When reviewing the grant or denial of summary judgment, this court applies the same standard as the trial court. *Id.* Summary judgment is appropriate only if the designated evidentiary material shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* If there is any doubt as to the existence of a genuine issue of material fact, such doubt must be resolved against the party moving for summary judgment. *Kronmiller v. Wangberg*, 665 N.E.2d 624, 627 (Ind. Ct. App. 1996), *trans. denied*.

If the movant fails to show there is no genuine issue of material fact, then summary judgment is precluded, “*regardless of whether the non-movant did or did not designate facts and evidence in response to the motion for summary judgment.*” *Templeton v. City of Hammond*, 679 N.E.2d 1368, 1371 (Ind. Ct. App. 1997) (emphasis in original). Thus, under our summary judgment procedure, Mitchell, as the moving

¹ We note that the Welches failed to address this issue in their Appellees’ brief. When an appellee fails to address an issue, the appellant may prevail by making a *prima facie* case of error. *Integon v. Singleton*, 795 N.E.2d 511, 513 (Ind. Ct. App. 2003).

party, has the burden of establishing the absence of any genuine issue of material fact as to the determinative issues. *See Will v. Meridian Insurance Group, Inc.*, 776 N.E.2d 1233, 1237 (Ind. Ct. App. 2002), *trans. denied*. A genuine issue of material fact exists “where facts concerning an issue which would dispose of litigation are in dispute or where the undisputed facts are capable of supporting conflicting inferences on such an issue.” *Id.* (quoting *Briggs v. Finley*, 631 N.E.2d 959, 963 (Ind. Ct. App. 1994), *trans. denied*). If Mitchell fails to meet his burden, then the Welches are not required to come forward with contrary evidence. All pleadings and testimony are construed liberally and in the light most favorable to the Welches, as the non-moving parties. *See id.*

In the present case, Mitchell designated his affidavit and supporting exhibits in support of his motion for summary judgment. The trial court apparently determined that these supporting exhibits were so equivocal and so lacking in content that instead of establishing an absence of genuine issue of material fact pertaining to the breach of contract and fraud claims, they created such an issue. Indeed, as we discuss in our examination of Issue II below, after the same exhibits were admitted at trial, the trial court found them to be of no value in establishing Mitchell’s claims. Under these circumstances, even if the Welches would not have responded to the summary judgment motion, the trial court was justified in denying Mitchell’s motion because the evidence designated by Mitchell supports conflicting inferences.

Furthermore, even though Mitchell failed to establish the absence of a genuine issue of material fact, the Welches responded to Mitchell’s motion. Mitchell is correct in noting that affidavits shall be made on personal knowledge, shall set forth such facts as

would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. *See* Indiana Trial Rule 56(e). Mitchell is also correct in noting that supporting exhibits should be sworn or certified. *See id.*; *Duncan v. Duncan*, 764 N.E.2d 763, 766 (Ind. Ct. App. 2002), *trans. denied*. However, while Mitchell is correct in arguing that the Welches' exhibits should not be considered because they are not sworn or certified, he is only partially correct in his argument pertaining to Cassandra's affidavit. It is important in understanding Mitchell's argument to pay attention to his use of qualifiers. He asserts that Cassandra's affidavit is "*primarily* conjecture, speculation, and simple expressions of opinion which lack a foundation" and "*nearly* each and every paragraph of the affidavit . . . contains hearsay evidence." Appellant's Brief at 12-13 (emphasis supplied). Even if Mitchell's statements are true, the qualifiers do not indicate that the affidavit in its entirety fails to meet the requirements of T.R. 56(e).

In the affidavit, Cassandra averred on personal knowledge that neither she nor her husband asked for or received a loan from Mitchell. Cassandra also averred that the Welches never agreed to use their house as collateral for the alleged loan. Cassandra further averred that the both she and Mitchell contributed \$10,000 to the start-up of their real estate business and that \$10,000 of their pooled money was used to facilitate a real estate purchase in October 2002, \$2,500 as earnest money and \$7,500 in closing costs. In addition, Cassandra averred that the real estate business suffered losses and that Mitchell told her that he would recover his losses from the Welches.

The portions of Cassandra's affidavit that complied with T.R. 56 were sufficient to raise genuine issues of material fact about Mitchell's claims. Accordingly, even if Mitchell's summary judgment motion and exhibits would have been sufficient to shift the burden to the Welches, Cassandra's affidavit was sufficient to establish the existence of genuine issues of material fact. Therefore, the trial did not abuse its discretion in denying Mitchell's summary judgment motion.

II. PROPRIETY OF THE TRIAL COURT'S JUDGMENT

Mitchell contends that the trial court erred in concluding that he failed at trial to establish his breach of contract and fraud claims. Although Mitchell acknowledges that the Welches' attorney cross-examined him at trial, he emphasizes that the Welches did not present any independent evidence. Mitchell argues that in order to reach its conclusion, the trial court would have had to disregard his testimony and his exhibits.

Mitchell testified that he and Cassandra started the real estate business and that he brought in his initial capital investment and technical knowledge about rehabilitation of houses, while Cassandra provided expertise consonant with her real estate and financial backgrounds. Mitchell also testified that the Welches approached him about the \$10,000 loan in September 2002 and explained that they needed the money for "mortgage or tax purposes." Appellant's App. at 26. Mitchell further testified that he agreed to make the loan in two installments and that the Welches agreed to make monthly payments, secure the loan with a mortgage on their house, and pay off the loan upon the sale of their house. In addition, he testified that the Welches did not repay the loan and that they misled him into believing that the loan was secured by a mortgage.

In support of his testimony, Mitchell entered Exhibit 1, which was a \$2500 cashier's check made out to "Washington Mutual" with a notation written at the bottom stating, "For: Brian/Cassandra Welch." The notation also included the Welches' address and what appears to be an account number. In addition to other exhibits, Mitchell presented Exhibit 4, a "Transaction Request Form" that contained Cassandra Welch's name and a "member number" handwritten on it. Also included in the exhibits are copies of what appear to be e-mail transmissions from Cassandra in which she refers to business matters, a loan whereby she owes Mitchell money, a question about a lien, and a question about having the business name added to "the loans."

In reaching its conclusion on the breach of contract issue, the trial court first listed Mitchell's allegations and then made the following observations about Mitchell's exhibits:

Exhibit 1. An Eli Lilly Federal Credit Union check made payable to Washington Mutual. The check has no endorsement. The memo section notes Brian/Cassandra Welch, reference number 0044197879. The date of the check was October 11, 2002. The front of the check has a received stamp of December 17, 2002, and the back of the check has a transaction date of December 19, 2002.

Exhibit 4. This Exhibit is a Transaction Request Form with the member number of XXXXXXXXXX and a name of Cassandra Welch. In the middle of said Exhibit, it states the total of the checks is [\$7,500.00]. In the indication "please apply the Deposit/Payment to:" a Money Market Savings (01) is circled. There is no amount listed in the application section. There is no date on the transaction slip. The Exhibit contains no markings or stamps from the financial institution.

Appellant's App. at 7.

The trial court also noted with reference to the fraud allegation that Mitchell alleged that “the material misrepresentation he relied upon was the aforementioned \$10,000.00 loan which was to be secured by a real estate mortgage on the Welches’ property” Appellant’s App. at 8.

The trial court then found (in pertinent part) with reference to both issues:

2. That none of the Exhibits were executed or signed by the [Welches].

4. That the Exhibits presumed to correspond with either the amounts and/or the dates are (sic) Exhibit “1,” was not cashed until December 19, 2002, was not endorsed by any parties to this action. It was made payable to Washington Mutual and Exhibit “4,” which is a Transaction Request Form from the Eli Lilly Federal Credit Union that is not dated and contains no stamps for verification or dates from Eli Lilly Federal Credit Union.

5. That [Mitchell] presented no records from Washington Mutual, Eli Lilly Federal Credit Union or the [Welches’] own bank accounts that the proceeds represented by the Exhibits were ever deposited in [the Welches’] accounts. . . .

6. If there is no underlying obligation, there would be nothing to secure. If there is no underlying obligation, there is no reason for a mortgage.

Appellant’s App. at 9-10.

After making its findings, the trial court concluded that Mitchell failed to establish his claims. Appellant’s App. at 10. In other words, the trial court determined that the evidence presented was insufficient to establish that a loan contract was made, that the Welches failed to abide by the terms of such a contract, and that Mitchell was defrauded.

The standard of review for the trial court's findings of fact made after a bench trial is whether the findings are clearly erroneous. Ind. Trial Rule 52(a). In reviewing a trial court's determination on the sufficiency of the evidence in a civil case, we neither weigh the evidence nor judge the credibility of witnesses. *Jamrosz v. Resource Benefits, Inc.*, 839 N.E.2d 746, 758 (Ind. Ct. App. 2005), *trans. denied*. Here, it is apparent that the trial court did not find Mitchell's testimony to be credible. Furthermore, the trial court concluded that the exhibits presented in support of that testimony were equivocal and deficient, and that there was no showing that the \$10,000 was ever given to the Welches. It appears that the trial court's assessment of Mitchell's testimony was based not only upon its observation of Mitchell as he testified, but also upon evidence which failed to show a signature by Cassandra or Brian as an endorsement on a check or in receipt of a loan and which failed to show any record that money was ever paid out of Mitchell's account to Cassandra and/or Brian. We do not believe that the trial court's determination is clearly erroneous, and we will not substitute our judgment for that of the trial court.

III. STATUTE OF FRAUDS

In addition to finding that the evidence was insufficient to support Mitchell's breach of contract and fraud claims, the trial court concluded that Mitchell's claims were barred by the statute of frauds.² The statute of frauds is an affirmative defense that must

² The statute of frauds is found at Ind. Code § 32-21-1-1, and it provides in pertinent part:

(b) A person may not bring any of the following actions unless the promise, contract, or agreement on which the action is based, or a memorandum or note describing the promise, contract, or agreement on which the action is based, is in

be raised in a pleading. Ind. Trial Rule 8(c). In order to preserve an affirmative defense, the party with the burden of proving the defense “must either have set forth the defense in a responsive pleading or show that the defense was litigated by the parties.” *Lawshe v. Glen Park Lumber Co.*, 176 Ind.App. 344, 375 N.E.2d 275, 277-78 (1978). It is generally true that an affirmative defense is waived by failure to raise it in the pleadings. *Custer v. Plan Commission of the City of Garrett*, 699 N.E.2d 793, 795 (Ind. Ct. App. 1998).

In the present case, the Welches did not plead the statute of frauds and they have not shown that the defense was litigated by the parties. Indeed, the only mention of the statute of frauds was by the Welches’ attorney in his closing argument. Accordingly, the Welches waived the defense, and the trial court erroneously applied it.

CONCLUSION

Because the affirmative defense of statute of frauds was waived, the trial court erred in applying the statute. However, the trial court’s error is harmless because the trial

writing and signed by the party against whom the action is brought or by the party's authorized agent:

- (1) An action charging an executor or administrator, upon any special promise, to answer damages out of the executor's or administrator's own estate.
- (2) An action charging any person, upon any special promise, to answer for the debt, default, or miscarriage of another.
- (3) An action charging any person upon any agreement or promise made in consideration of marriage.
- (4) An action involving any contract for the sale of land.
- (5) An action involving any agreement that is not to be performed within one (1) year from the making of the agreement.
- (6) An action involving an agreement, promise, contract, or warranty of cure concerning medical care or treatment. However, this subdivision does not affect the right to sue for malpractice or negligence.

court's determination that the evidence was insufficient to prove Mitchell's claims is not clearly erroneous.

Affirmed.

KIRSCH, C.J., and BARNES, J., concur.